(3)

No. 92-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BERTRAM E. LACEY,

Petitioner,

v.

THE DOW COMPANY,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

I. THE APPLICABILITY OF THE CIVIL RIGHTS ACT OF 1991 1

II. THE ISSUE OF CONSTRUCTIVE DISCHARGE ... 2

CONCLUSION 4

TABLE OF AUTHORITIES

Cases: *Pages:*

Landgraf v. USI Film Products, No. 92-757 ..... 2, 4

McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) 2

Milligan-Jensen v. Michigan Technological University, No. 92-1214 ..... 3, 4

Milligan-Jensen v. Michigan Technological University, 975 F.2d 302 (6th Cir. 1992) 3

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 1

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 3

Rivers v. Roadway Express, Inc., No. 92-938 ..... 2, 4

Trans World Airlines v. Thurston, 469 U.S. 111 (1984) 2, 3

Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992) 3

Statutes: *Pages:*

42 U.S.C. § 1981 1

Civil Rights Act of 1991 ..... 1, 2

Title VII of the Civil Rights Act of 1964 ..... 2, 3

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I.

THE APPLICABILITY OF THE CIVIL RIGHTS ACT OF 1991

Respondent argues that even if the Civil Rights Act of 1991 applies to this case, petitioner has no claim under 42 U.S.C. § 1981 since the complaint was filed outside of the applicable state statue of limitations. However, petitioner's section 1981 claim was not dismissed by the district court on that ground, but rather on the basis of this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Appendix to Petition for a Writ of Certiorarir (hereinafter "App."), pp. 1a-2a. Therefore, if this Court holds that section 101 of the Civil Rights Act of 1991 applies to cases pending as of the date of its enactment in *Rivers v. Roadway Express, Inc.*, No. 92-938, then the appropriate course would be to vacate the decision below and remand to the court below for consideration in the first instance of the applicability of that decision to the present case.

Similarly, respondent argues that there were no employment decisions adverse to petitioner within the applicable time periods under Title VII of the Civil Rights Act of 1964. However, this was manifestly *not* the basis of the decisions of the courts below denying plaintiff relief under Title VII. The magistrate judge held that petitioner had been discriminated against because of his race in being given a low performance evaluation in 1987 and that petitioner's decision to question that evaluation "began a chain of events which ultimately led to the plaintiff's resignation." App. 37a-38a. Thus, again, if the Court holds, in *Landgraf v. USI Film Products*, No. 92-757, that section 102 of the Civil Rights Act of 1991 applies to cases pending at the time of its enactment, the appropriate action would be to vacate the decision below and remand for consideration of the applicability of that decision to this case.

II.

THE ISSUE OF CONSTRUCTIVE DISCHARGE

Respondent argues that petitioner does not take issue with the legal standard applied by the courts below in deciding the question of constructive discharge. This is manifestly not the case. In the petition for a writ of certiorari, petitioner argues that the courts below were incorrect in deciding the case by using the analysis set out in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Petition for a Writ of Certiorari at pp. 11-12.

Instead, since here the magistrate judge found direct evidence of intentional discrimination, the proper standard was that set out in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1984). That is, since there was a finding that there was discrimination, there necessarily was a violation of Title VII, and the question was what relief was proper unless the respondent was able to meet the burden of proof required by *Thurston*. *See also*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

This case, therefore, involves an issue closely related to that raised in *Milligan-Jensen v. Michigan Technological University*, No. 92-1214, in which certiorari was granted on June 21, 1993, after the petition for certiorari was filed herein. In both constructive discharge cases such as the present case, and in after-acquired evidence cases such as *Milligan-Jensen*, the lower courts have confused the issue of whether there is *liablity* under Title VII with what *relief* should be granted.

Thus, in the present case the court of appeals held that even though petitioner had been discriminated against in his working conditions, there had been no violation of Title VII because those conditions were not sufficiently intolerable so as to force him to resign. App. p. 3a-4a. In *Milligan-Jensen*, the court of appeals held that since the petitioner would have been terminated if the employer had known about her falsification of her application, it was "irrelevant whether or not she was discriminated against." 975 F.2d 302, 305 (6th Cir. 1992). Other courts of appeals have rejected this rule, holding that in an after-evidence case, the employer should be held liable for violating Title VII, but that the relief the employee may obtain may be limited. *See, e.g.*, *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992).

Similarly, in a constructive discharge case, the question of whether an employee was justified in leaving because of unlawful discrimination does not even arise

unless there is a finding that such discrimination existed. Thus, the issue raised is properly not whether there has been a violation of Title VII, as the court below erroneously held, but whether the relief the employee may recover is limited because conditions were not so severe as to force a reasonable person to resign rather than stay and fight the unlawful discrimination.

Because of the relevance of the resolution of *Milligan-Jensen* to the issue of constructive discharge presented here, it would be appropriate for the Court to dispose of the petition for writ of certiorari based on its decision in *Milligan-Jense* as well as in *Rivers v. Roadway Express* and *Landgraf v. USI Film Industries*.

Conclusion

For the foregoing reasons, the poetition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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